Supreme Court, U.S.
FILED
01136 MAR -5 2002
OFFICE OF THE CLERK

No._____

In the Supreme Court of the United States

JEROME J. WISNESKI,

Petitioner,

v

RICHARD LEMARBE,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

JENNIFER M. GRANHOLM
Attorney General

Thomas L. Casey
Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

Leo H. Friedman
John L. Thurber
Assistant Attorneys General

Attorneys for Petitioner

55PP

QUESTION PRESENTED FOR REVIEW

The doctrine of qualified immunity requires (1) that a constitutional violation be alleged; and (2) that the alleged conduct be clearly established as a constitutional violation. *Saucier v. Katz*, 533 U.S. 194; 121 S. Ct. 2151; 150 L Ed 2272 (2001). To establish an Eighth Amendment violation for a failure to provide medical care, a prisoner must establish that the prison official acted with deliberate indifference. *Estelle v. Gamble*, 429 U.S. 97 (1976); *Farmer v. Brennan*, 511 U.S. 825, 847 (1994). Deliberate indifference requires that "[A] prison official may be held liable under the Eighth Amendment . . . only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it."

Dr. Wisneski performed exploratory surgery to determine the source of fluid in Mr. LeMarbe's abdomen and then subsequently referred him to a specialist when he could not locate the source of the fluid. Did the Court of Appeals err in denying qualified immunity when it held that Dr. Wisneski acted with deliberate indifference?

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 7

This Court should grant certiorari because the holding of the Court of Appeals is in conflict with this Court's holdings in *Estelle v. Gamble*, 429 U.S. 97 (1976); and *Farmer v. Brennan*, 511 U.S. 825 (1994). 9

A. Dr. Wisneski's actions did not violate Mr. LeMarbe's constitutional rights under the Eighth Amendment. 9

B. Dr. Wisneski did not act in violation of clearly established law. 15

CONCLUSION 19

TABLE OF AUTHORITIES

Page

Cases

Estelle v. Gamble,
429 U.S. 97 (1976) ..... passim

Farmer v. Brennan,
511 U.S. 825, 847 (1994) ..... passim

Harlow v. Fitzgerald,
457 U.S. 800 (1982) 7, 15

LeMarbe v. Wisneski,
266 F.3d 429 (6th Cir. 2001) 4, 11, 18

Mitchell v. Forsyth,
472 U.S. 511 (1985) 7

Sanville v. McCaughtry,
266 F.3d 724 (7th Cir. 2001) 15

Saucier v. Katz,
533 U.S. 194; 121 S. Ct. 2151;
150 L Ed 2272 (2001) ..... passim

Siegert v. Gilley,
500 U.S. 226, 232 (1991) 15

Stewart v. Murphy,
174 F.3d 530 (5th Cir. 1999) 14

White v. Napoleon,
897 F.3d 103 (3rd Cir. 1990) 14

Williams v. Mehra,
186 F.3d 385 (6th Cir. 1999) 11, 16

Youngberg v. Romero,
457 U.S. 307 (1982) 16

Statutes

28 U.S.C. § 1254(1) 1

Constitutional Provisions

U. S. Const. amend VIII 1

OPINIONS BELOW

The September 19, 2001 opinion of the Court of Appeals is reported at 266 F.3d 429 (6th Cir. 2001), and is reprinted in the Appendix to this Petition, App. 1a-24a. The prior opinion of the United States District Court for the Eastern District of Michigan entered on March 31, 2000, is not reported, and is reprinted in the Appendix to this Petition, App., pp 23a-29a.

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit sought to be reviewed was entered on September 19, 2001. On December 7, 2001, the Court of Appeals issued its Order denying Dr. Wisneski's Petition for Rehearing En Banc. App., p 30a.

This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

U. S. Const. amend VIII provides that:

> Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

The Respondent, Richard LeMarbe, is currently an inmate at the Ryan Correctional Facility (Ryan) in Detroit, Michigan. The events surrounding his complaint occurred in 1996 while he was an inmate at the G. Robert Cotton Correctional Facility in Jackson, Michigan (Cotton).

In 1996, the Petitioner, Dr. Jerome Wisneski, was a physician employed by the Michigan Department of Corrections. He is currently employed by Correctional Medical Services.

Mr. LeMarbe arrived at Cotton on April 24, 1996, from the Riverside Correctional Facility in Ionia, Michigan. At that time, Dr. Wisneski was a surgeon at the Duane Waters Hospital (DWH) in Jackson, Michigan.

When Mr. LeMarbe arrived at Cotton, he was a 62-year-old male suffering from bladder stones. He was also a chronic smoker with a history of health problems.

Dr. Wisneski's first contact with Mr. LeMarbe was on July 11, 1996, when he saw him in a surgery clinic. Dr. Wisneski believed that Mr. LeMarbe needed surgery. Dr. Wisneski saw Mr. LeMarbe again on July 16, 1996, and noted that surgery would be performed as soon as possible. Dr. Wisneski performed an operation known as a cholecystectomy on July 22, 1996 to remove Mr. LeMarbe's gallbladder. Two days later, on July 24, 1996, Dr. Wisneski saw Mr. LeMarbe and made an entry on his chart that Mr. LeMarbe was doing well. Dr. Wisneski saw Mr. LeMarbe on the 29th of July and again the next day. At that time, Mr. LeMarbe's abdomen had become distended with fluid. After running a number of tests Dr. Wisneski teamed with Dr. Edgar Eichbaum to perform exploratory surgery on July 31, 1996, to determine if Mr. LeMarbe had a small bowel obstruction, and to determine why he was nauseated and had a distended abdomen. Neither Dr. Wisneski nor Dr. Eichbaum were able to locate the source of the biliary fluid.

Dr. Wisneski next saw Mr. LeMarbe on August 6, 1999. Dr. Wisneski noted that the patient "[W]as frisky and anxious to leave." In fact, Mr. LeMarbe was doing well enough at that point that Dr. Wisneski discharged him. Unfortunately, Mr. LeMarbe's abdomen became distended a second time. Dr. Wisneski kept Mr. LeMarbe under observation at DWH to observe his condition more carefully.

On August 13, 1996, Dr. Wisneski referred Mr. LeMarbe to a gastroenterologist, Dr. Mario Hurtado. He did so to find out why Mr. LeMarbe's abdomen was distended. While Mr. LeMarbe was at DWH, he was observed twenty-four hours a day by hospital personnel.

Dr. Wisneski did not make any entries in Mr. LeMarbe's chart after August 13, 1996. Mr. LeMarbe transferred to Foote Hospital in Jackson, Michigan on August 16, 1996.

Following his stay at DWH, Mr. LeMarbe continued to have problems. He had additional surgeries performed by a surgeon, Dr. Blaine Tacia, at Foote Hospital in Jackson and by other surgeons at the Detroit Receiving Hospital.

Mr. LeMarbe alleged that Dr. Wisneski acted with deliberate indifference and violated his rights under the Eighth Amendment. Mr. LeMarbe also claims that Dr. Wisneski committed the state law tort of gross negligence.

Mr. LeMarbe initially filed his Complaint in Jackson County Circuit Court in Jackson, Michigan, on June 30, 1998. Mr. LeMarbe's original Complaint named the Cotton Correctional Facility, John Doe, Sharon Fairbanks, a dietician at Cotton; Duane L. Waters Hospital; Dr. Wisneski; Dr. Allen Price; and Dennis Straub, the Warden at Cotton, as Defendants.

Dr. Wisneski subsequently removed this matter to the Eastern District of Michigan.

Mr. LeMarbe agreed to dismiss the Cotton Correctional Facility and Duane L. Waters Hospital with prejudice on December 15, 1998.

The Court permitted Mr. LeMarbe to file a First Amended Complaint on May 28, 1999. Mr. LeMarbe did not name Dr. Price or John Doe in his Amended Complaint.

Dr. Wisneski's counsel submitted summary judgment motions on behalf of Wisneski and Defendants Fairbanks and Straub. The Magistrate Judge recommended that Fairbanks and Straub be dismissed. Mr. LeMarbe did not object to the Magistrate Judge's recommendation regarding Fairbanks and Straub. The District Court accepted the Report and Recommendation and dismissed Fairbanks and Straub in an Opinion and Order dated March 31, 2000. (App., pp 23a-29a).

Dr. Wisneski's counsel also filed two summary judgment motions as to Dr. Wisneski, the only remaining defendant. In response to Dr. Wisneski's dispositive motions, Mr. LeMarbe filed an affidavit by Dr. James Sarnelle in which he concluded that Dr. Wisneski acted with deliberate indifference. In the second of these motions, Dr. Wisneski maintained that he was entitled to qualified immunity. On September 22, 1999, the Magistrate Judge recommended that Dr. Wisneski's motion based on qualified immunity should be denied. The District Court adopted the Magistrate's Report and Recommendation of September 22, 1999, in its Opinion and Order of March 31, 2000. (App., pp 23a-29a).

Dr. Wisneski filed an appeal based on qualified immunity on April 12, 2000 in the Court of Appeals.

The Court of Appeals issued an Opinion on September 19, 2001, affirming the decision of the District Court denying Dr. Wisneski's dispositive motion based on qualified immunity. *LeMarbe v. Wisneski*, 266 F.3d 429 (6th Cir. 2001). (App., pp 1a-22a). The Court of Appeals, relying heavily on the affidavit supplied by Mr. LeMarbe, concluded that LeMarbe had "alleged facts that, when viewed in a light most favorable to him would show that Dr. Wisneski was aware of facts from which a substantial risk of serious harm could be inferred." App., p 11a. The Court then went on to conclude that:

> LeMarbe has alleged facts that, when viewed in a light most favorable to him, would show that Dr. Wisneski drew the inference that LeMarbe faced a substantial risk of serious harm from the

> bile leak in his abdomen and that Dr. Wisneski disregarded such risk when he closed LeMarbe's surgical incision on July 31, 1996, failed to refer LeMarbe *immediately* to a specialist who could stop the leak, and also failed to inform LeMarbe of the failure to stop the leak so that LeMarbe could take any additional measures necessary to stop the leak *in a timely manner, i.e.* request medical treatment from a specialist who could stop the leak. [App., p 11a.]

The dissenting opinion in the Court of Appeals concluded that the majority applied an incorrect analysis and gave improper weight to the affidavit, App., pp 20a-22a.

> More importantly, *Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct. 1970 (1994), could not have been more clear that it is a subjective standard federal courts must apply in cases such as this. *See Farmer*, 511 U.S. at 829, 114 S. Ct. at 1974 ("This case requires us to define the term 'deliberate indifference,' as we do by requiring a showing that the official was *subjectively* aware of the risk.") (Emphasis added.)[1]
>
> But as is clear from the majority's opinion, the majority applies an objective standard to conclude that Dr. Wisneski may have acted with deliberate indifference towards LeMarbe's serious medical needs.
>
> Nowhere is this more clear than in the majority's relying upon an affidavit from an expert witness, Dr. Sarnelle. To make out the subjective showing that *Farmer* requires, Sarnelle's affidavit would have to say that Sarnelle knows, first, that Dr. Wisneski actually

knew facts from which an inference of excessive risk could be drawn, and second, that Dr. Wisneski actually drew that inference. But Sarnelle's affidavit simply provides Sarnelle's opinion of what Dr. Wisneski or anyone with a medical education should have known. Sarnelle's affidavit thus provides an objective standard, not a subjective one, and this is wholly insufficient to show an Eighth Amendment violation.

* * *

To the extent that the majority points to evidence besides Dr. Sarnelle's affidavit to establish Dr. Wisneski's alleged deliberate indifference, I respectfully disagree. Again, *Williams* and *Farmer* demand that we apply a subjective standard. Here, applying that subjective standard requires LeMarbe to show that Dr. Wisneski actually identified a severed bile duct as the problem and then, despite having identified the problem, Dr. Wisneski sewed up LeMarbe, aware that substantial harm would likely result. But that is simply not what the record evidence shows in this case.

What the undisputed record evidence shows is that both Dr. Wisneski and Dr. Eichum looked for a leak in LeMarbe's bile duct, and when they found no leak, erroneously concluded that there was none and closed LeMarbe's incision. While Drs. Wisneski and Eichum may have committed medical malpractice when they failed properly to diagnose LeMarbe's problem, they did not violate LeMarbe's Eighth Amendment rights. *See Estelle v. Gamble*, 429 U.S. 97, 105-06, 97 S. Ct. 285, 291-92 (1976).[(2)] (Deliberate

indifference does not include negligence in diagnosing a medical condition.).

---

[1] *See also Farmer*, 511 U.S. at 837, 114 S. Ct. at 1979 ("We reject petitioner's invitation to adopt an objective test for deliberate indifference.").

[2] *See also Sanderfer v. Nichols*, 62 F.3d 151, 154 (6th Cir. 1995) ("Deliberate indifference, however, does not include negligence in diagnosing a medical condition.") (citing *Estelle*, 429 U.S. at 106, 97 S. Ct. at 292).

Dr. Wisneski filed a Petition for Rehearing and Rehearing *En Banc* on October 2, 2001. Subsequently, on December 7, 2001, the Court of Appeals issued its Order denying Dr. Wisneski's Petition for Rehearing *En Banc*. (App., p 30a).

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari because the holding of the Court of Appeals is in direct conflict with this Court's holdings in *Estelle v. Gamble*, 429 U.S. 97 (1976); and *Farmer v. Brennan*, 511 U.S. 825 (1994).

Dr. Wisneski maintains that he is entitled to qualified immunity from money damages. Government officials are entitled to qualified immunity when their actions do not violate clearly established constitutional rights. *Mitchell v. Forsyth*, 472 U.S. 511 (1985); and *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The Court of Appeals analysis of qualified immunity is fundamentally flawed because it failed to properly examine the existence of a constitutional violation. Instead it impermissibly equates the constitutional standard of deliberate indifference with the tort standard of negligence. Certiorari should be granted to prevent the Court of Appeals error from infecting other cases.

This Court recently reaffirmed the standard for evaluating claims based on qualified immunity. In *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 2156; 150 L Ed 2272 (2001), this Court held:

> A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry. *Siegert v. Gilley*, 500 U.S. 226, 232; 114 L.Ed.2d 277; 111 S. Ct. 1789 (1991).
> * * *
>
> If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity. On the other hand, if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established. This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition; and it too serves to advance understanding of the law and to allow officers to avoid the burden of trial if qualified immunity is applicable.

This Court should grant certiorari because the holding of the Court of Appeals is in conflict with this Court's holdings in *Estelle v. Gamble*, 429 U.S. 97 (1976); and *Farmer v. Brennan*, 511 U.S. 825 (1994).

A. Dr. Wisneski's actions did not violate Mr. LeMarbe's constitutional rights under the Eighth Amendment.

The standard for evaluating claims by prisoners that prison officials have failed to provide medical care that comports with the Eighth Amendment is deliberate indifference. *Estelle v. Gamble*, 429 U.S. 97 (1976); and *Farmer v. Brennan*, 511 U.S. 825 (1994). Deliberate indifference requires a state of mind more blameworthy than negligence. *Farmer, supra*, at 835. The test for deliberate indifference is a subjective test which requires that:

> [T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference. [*Id.*, at 837.]

Under the facts of the instant case, Mr. LeMarbe has not established that Dr. Wisneski acted with deliberate indifference. Mr. LeMarbe has done nothing more than set forth facts which might amount to a state law claim for medical malpractice.

This Court further defined deliberate indifference in *Farmer* in holding:

> We hold instead, that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or

> safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists and he must also draw the inference. But an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation cannot, under our cases, be condemned as the infliction of punishment. [*Farmer, supra*, at 837.]

This Court continued:

> [P]rison officials who actually know of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted. A prison official's duty under the Eighth Amendment is to ensure "reasonable safety." [*Id.*, at 844.]

Dr. Wisneski's actions were reasonable under the circumstances. He treated Mr. LeMarbe numerous times post-operatively; performed exploratory surgery with another surgeon to assist in looking for problems; hospitalized Mr. LeMarbe for close observation; and ultimately referred Mr. LeMarbe to a specialist for further treatment. Consequently, Dr. Wisneski could not have committed a constitutional violation. The Court of Appeals erred by even examining whether Mr. LeMarbe's rights were clearly established.

It is important for this Court to keep in mind that Mr. LeMarbe was under constant observation by medical personnel from the time of his initial surgery on July 22, 1996 until he left for Foote Hospital on August 14, 1996. Dr. Wisneski did not simply close up his surgical incision and send him back to his cell. It should also be noted that Dr. Wisneski called another physician, Dr. Edgar Eichbaum, to assist in the exploratory surgery on July 31, 1996, and then placed Mr.

LeMarbe under observation at DWH. As of August 6, 1996, he noted Mr. LeMarbe was responding well. Following that, he referred Mr. LeMarbe to Dr. Hurtado when his condition did not improve.

The Court of Appeals misinterpreted this Court's decisions in *Estelle* and *Farmer* and applied a purely objective standard to a deliberate indifference claim.

The dissenting opinion in the Court of Appeals correctly indicated that the majority departed from its own *en banc* holding in *Williams v. Mehra*, 186 F.3d 385 (6th Cir. 1999), and this Court's precedent including *Farmer v. Brennan*, 511 U.S. 825 (1994), and *Estelle v. Gamble*, 429 U.S. 97 (1976). *LeMarbe v. Wisneski*, 266 F.3d 429, 441 (6th Cir. 2001); App., p 20a. *Estelle* and *Farmer* clearly established that an Eighth Amendment claim requires both an objective and a subjective element. The majority simply ignored that requirement and focused solely on the objective element. The Sixth Circuit proceeded to step two of the qualified immunity analysis required under *Saucier* without properly determining whether Dr. Wisneski ever violated a constitutional right.

Essentially, the Court of Appeals has equated the deliberate indifference standard set forth in *Estelle* and *Farmer*, to a negligence standard. The Court concluded that the affidavit of Mr. LeMarbe's expert, Dr. Sarnelle, was sufficient to create a genuine issue of material fact. In truth, it did nothing more than raise a question of negligence. The Court's decision undermines *Estelle* and *Farmer* because it equates state law negligence with deliberate indifference.

Dr. Sarnelle's affidavit does not speak to the subjective element of Eighth Amendment claims. It does not, and cannot, address Dr. Wisneski's state of mind. The panel accepted Dr. Sarnelle's affidavit in which he concluded "Jerome Wisneski, M.D. knew that Richard LeMarbe was going to suffer painful and serious internal injuries if the injury was not located and repaired." Dr. Sarnelle cannot testify as to Dr. Wisneski's state of mind. It was incorrect for the panel to place such reliance on Dr. Sarnelle's affidavit to satisfy the subjective element of

an Eighth Amendment claim. The evidence submitted to the District Court and the Court of Appeals does not establish that Dr. Wisneski knew that a substantial harm would result. Even if every aspect of Dr. Sarnelle's affidavit is true, it does not satisfy the subjective element of an Eighth Amendment claim. Not noticing that an inmate exhibits a serious medical need is not a constitutional violation because not noticing that a need exists is not considered "punishment." *Farmer, supra*, at 837-38.

If the Court of Appeals opinion is allowed to stand then there will be no difference between a constitutional claim for deliberate indifference and a state law claim for medical malpractice. The Court of Appeals will have a published decision that will be cited by future litigants that directly conflicts with this Court's cases regarding deliberate indifference dating back to 1976. It is essential that litigants especially physicians willing to work in prisons know, in advance, what legal standards are going to govern their case. The majority's decision calls in to doubt the validity of *Estelle, supra* and *Farmer, supra*. Litigants now will be put in the position of having to cite a case which clearly conflicts with this Court's precedent.

There is no way to distinguish the instant case from *Estelle*. In both cases, a prisoner was given extensive medical care. Unfortunately, the medical care given did not cure the prisoner. *Estelle* is directly on point. In *Estelle*, this Court held that once a medical professional has provided some medical treatment he cannot be found to be deliberately indifferent. When a prisoner receives the amount of medical care that Mr. LeMarbe received in the case at bar, there cannot be a constitutional violation. Thus, under *Saucier*, the Court's inquiry is over. No reasonable prison doctor in 1996 could have known that once he had exercised his professional judgment that he could be constitutionally liable for damages.

In *Estelle, supra*, at 105, this Court concluded:

> [A]n inadvertent failure to provide adequate medical care cannot be said to constitute "an unnecessary and wanton infliction of pain" or to be "repugnant to the conscience of mankind." Thus, a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend "evolving standards of decency."

This Court noted that the inmate in *Estelle* was seen by medical personnel seventeen times. Similarly, medical personnel saw Mr. LeMarbe dozens of times between his initial surgery on July 22, 1996, and Dr. Wisneski's decision to refer Mr. LeMarbe to a specialist on August 13, 1996. Additionally, as noted above, Mr. LeMarbe was in a hospital, observed by medical professionals twenty-four hours a day his entire stay at DWH. Under those circumstances, Dr. Wisneski's conduct could not amount to a constitutional violation and thus, he is entitled to qualified immunity under *Saucier, supra.*

The panel's decision is in conflict with decisions of other circuits as well. For example, the Third Circuit has held:

> If a Plaintiff's disagreement with a doctor's professional judgment does not state a violation of the Eighth Amendment, then certainly no claim is stated when a doctor disagrees with the professional judgment of another doctor. There may, for example, be several acceptable ways to

> treat an illness. [*White v. Napoleon*, 897 F.3d 103, 110 (3rd Cir. 1990).]

The Fifth Circuit held in a case similar to the case at bar that the opinion of the plaintiff's expert witness was not enough to create a material issue of fact. *Stewart v. Murphy*, 174 F.3d 530 (5th Cir. 1999) (upholding the District Court's decision to grant summary judgment to two physicians despite the affidavit of the Plaintiff's expert because the Plaintiff did not satisfy the subjective element of *Farmer* and *Estelle*). The facts in *Stewart* parallel those in the case at bar. A prisoner's estate brought a claim against four physicians for deliberate indifference. The prisoner suffered from ulcers on his back beginning in August of 1994. A prison physician, Dr. Dial, ordered that the ulcer be treated with antibiotics. A second doctor subsequently ordered that the dressings should be changed two to three times a day. The second doctor, Dr. Kim, ultimately referred the prisoner to a Dr. Wright at a non-prison hospital. Upon his return to prison, Dr. Kim did not follow Dr. Wright's diagnosis that the prisoner should be transferred to a different facility. Rather, Dr. Kim ordered that the prisoner should be kept out of bed as much as possible and that nurses should move his extremities. A third physician, Dr. Knutson, took over from Dr. Kim and periodically checked the prisoner's wounds and ordered that the prisoner get out of bed for extended periods of time. Dr. Knutson never prescribed antibiotics for the ulcers. On November 30, 1994, Dr. Knutson admitted the prisoner to a non-prison hospital. The admitting physician testified it was the worse case of ulcers he had ever seen. The prisoner died on December 7, 1994 due to the ulcers.

The Court of Appeals concluded the prisoner did not have a valid Eighth Amendment claim under *Estelle* or *Farmer*. Since the physicians had actively treated the prisoner's medical condition, the prisoner's claim failed. *Stewart, supra*, at 537.

Similarly, the Seventh Circuit granted summary judgment to two physicians who failed to prevent a prisoner's suicide

because they exercised their medical judgment in their treatment of him. *Sanville v. McCaughtry*, 266 F.3d 724 (7th Cir. 2001). In *Sanville*, the Court of Appeals rejected the claim a physician's failure to prevent even possible harm might amount to deliberate indifference. Rather, the Court of Appeals concluded that a physician's exercise of his medical judgment could not amount to an Eighth Amendment violation, even if, in hindsight, his decision turned out to be incorrect. *Id.*, at 737. The Court commented, "Although we wish Dr. Pareek could have prevented Matt's suicide, physicians do not practice with a crystal ball in hand." *Sanville, supra*, at 736.

B. Dr. Wisneski did not act in violation of clearly established law.

In *Harlow*, this Court held:

> If the law at the time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. [*Harlow, supra*, at 818.]

A court should only proceed to determine whether a right is clearly established if, and only if, there has been a constitutional violation. *Siegert v. Gilley*, 500 U.S. 226, 232 (1991).

Even if this Court determines that Dr. Wisneski could have violated Mr. LeMarbe's rights under *Farmer* and *Estelle*, Dr. Wisneski certainly did not act in violation of clearly established law.

Mr. LeMarbe simply suggested alternate methods of care. Whether Dr. Wisneski could have performed additional tests which could have detected the source of Mr. LeMarbe's problems is not relevant in determining deliberate indifference.

Six years after *Estelle*, this Court held, "[T]he Constitution only requires that the Courts make certain that professional judgment, in fact, was exercised. It is not appropriate for the Courts to specify which of several professionally acceptable choices should have been made . . . ." *Youngberg v. Romero*, 457 U.S. 307, 321 (1982).

Moreover, in *Farmer, supra,* at 844-845, this Court held:

> [P]rison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted. A prison official's duty under the Eighth Amendment is to ensure "reasonable safety," (citations omitted) a standard that incorporates due regard for prison officials' "unenviable task of keeping dangerous men in safe custody under humane conditions." (Citations omitted). Whether one puts it in terms of duty or deliberate indifference, prison officials who act reasonably cannot be found liable under the Cruel and Unusual Punishments Clause.

Clearly, under the circumstances, Dr. Wisneski acted in a reasonable manner. He performed exploratory surgery and ultimately referred Mr. LeMarbe to a specialist. No prison official in 1996 could have known that taking such actions violated the constitution.

Dr. Wisneski delivered extensive medical treatment to Mr. LeMarbe and properly exercised his professional judgment. Mr. LeMarbe simply disputes the adequacy of the treatment.

The Court of Appeals decision is also contrary to an earlier *en banc* opinion of the Court of Appeals. *Williams v. Mehra*, 266 F.3d 429 (6th Cir. 1999), as noted by the dissenting opinion below, App., p 20a:

> In *Williams*, we spoke definitively to the question of what kind of standard (subjective or objective) we must apply in § 1983 cases brought by a prisoner hoping to allege an Eighth Amendment violation because some prison official allegedly acted with deliberate indifference toward the prisoner's serious medical needs. That standard is unequivocally a subjective standard.

By adopting a standard that is in direct conflict with Supreme Court and Court of Appeals precedent requiring a subjective standard for Eighth Amendment claims, the panel should have concluded Dr. Wisneski was entitled to qualified immunity. No reasonable prison physician could have known that a prisoner could state a claim under the Eighth Amendment without satisfying the subjective element of *Farmer*.

No reasonable prison doctor in 1996 could have known that once he had exercised his professional judgment that he could be liable for damages for a constitutional violation. The case at bar is so factually similar to *Estelle* and *Farmer* that this Court must reverse the Court of Appeals decision and hold that Dr. Wisneski is entitled to qualified immunity from money damages.

Mr. LeMarbe went to great lengths in front of the District Court to point out things that Dr. Wisneski could have done differently. That, however, is not the question. As this Court held:

> [T]he question whether an x-ray, or additional diagnostic techniques or forms of treatment are indicated is a classic example of a matter for medical judgment. A medical decision not to order an x-ray, or like measures, does not represent cruel and unusual punishment. At

> most, it is medical malpractice, and as such the proper forum is the state court. [*Estelle, supra*, at 107.]

Simply suggesting alternate methods of treatment does not set forth an Eighth Amendment violation.

In *Saucier, supra*, this Court held that any analysis of qualified immunity had to begin with whether a constitutional violation had even occurred. Under *Farmer* and *Estelle*, Mr. LeMarbe cannot establish that a constitutional violation even occurred. The Court of Appeals should not have ever proceeded to determine whether Dr. Wisneski violated a clearly established right. Once Mr. LeMarbe received care, Dr. Wisneski could not have acted with deliberate indifference. Simply because Dr. Sarnelle had a different opinion does not mean that Dr. Wisneski failed to take reasonable steps to treat Mr. LeMarbe. As the dissenting judge correctly observed:

> To make out the subjective showing that *Farmer* requires, Sarnelle's affidavit would have to say that Sarnelle knows, first, that Dr. Wisneski actually knew facts from which an inference of excessive risk could be drawn, and second, that Dr. Wisneski actually drew that inference. But Sarnelle's affidavit simply provides Sarnelle's opinion of what Dr. Wisneski or anyone with a medical education should have known. Sarnelle's affidavit thus provides an objective standard, not a subjective one, and this is wholly insufficient to show an Eighth Amendment violation. Citations omitted. [*LeMarbe, supra*, at 441; App., p 21a.]

Because the Court of Appeals opinion is in direct conflict with Supreme Court precedent, this Court should grant the Petition for Certiorari and reverse the Court of Appeals.

CONCLUSION

For all of these reasons, Dr. Wisneski respectfully requests this Court to grant Certiorari and reverse the Court of Appeals.

Respectfully submitted,

JENNIFER M. GRANHOLM
Attorney General

Thomas L. Casey
Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

Leo H. Friedman
John L. Thurber
Assistant Attorneys General

Attorneys for Petitioner

Dated: March, 2002

TABLE OF CONTENTS

Page

Sixth Circuit Court of Appeals Opinion
dated September 19, 2001 ..... 1a-22a

United States District Court Opinion and Order
dated March 31, 2000 ..... 23a-29a

Sixth Circuit Court of Appeals Order Denying
Petition for Rehearing *En Bànc*
dated December 7, 2001 ..... 30a

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

ELECTRONIC CITATION: 2001 FED App. 0329P (6th Cir.)
File Name: 01a0329p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Richard LeMarbe,
Plaintiff-Appellee,

No. 00-1383

v.

Jerome J. Wisneski,
Defendant-Appellant,

Sharon Fairbanks; Dennis Straub,
Defendants.

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 98-74028--Denise Page Hood, District Judge.

Argued: June 8, 2001
Decided and Filed: September 19, 2001
Before: KEITH, BATCHELDER, and MOORE,
Circuit Judges.

COUNSEL

ARGUED: John L. Thurber, OFFICE OF THE ATTORNEY GENERAL, CORRECTIONS DIVISION, Lansing, Michigan, for Appellant. John M. Leh, SERMAN & LEH, Lake Orion, Michigan, for Appellee. **ON BRIEF:** John L. Thurber, OFFICE OF THE ATTORNEY GENERAL, CORRECTIONS DIVISION, Lansing, Michigan, for Appellant. John M. Leh, SERMAN & LEH, Lake Orion, Michigan, for Appellee.

MOORE, J., delivered the opinion of the court, in which KEITH, J., joined. BATCHELDER, J. (pp. 19-21), delivered a separate dissenting opinion.

OPINION

KAREN NELSON MOORE, Circuit Judge. On June 30, 1998, Plaintiff-Appellee Richard LeMarbe ("LeMarbe"), a Michigan state prisoner, filed this lawsuit against Cotton Correctional Facility, Duane L. Waters Hospital, Sharon Fairbanks, Dennis Straub, Defendant-Appellant Dr. Jerome Wisneski ("Dr. Wisneski"), Dr. Allen Price, and a John Doe defendant, alleging that the defendants displayed deliberate indifference to his serious medical needs in violation of his rights under the Eighth Amendment. During the course of this lawsuit, all of the defendants, except for Dr. Wisneski, were dismissed from this action through either voluntary dismissal

or summary judgment.[1] On March 31, 2000, the district court accepted the magistrate judge's report and recommendation to deny Dr. Wisneski's motion for summary judgment based upon qualified immunity. Dr. Wisneski now appeals the district court's denial of his motion for summary judgment. For the reasons that follow, we **AFFIRM** the district court's decision.

I. BACKGROUND

LeMarbe is a state prisoner at the Cotton Correctional Facility in Ionia, Michigan. On July 11, 1996, LeMarbe sought medical treatment for severe abdominal pain at Duane L. Waters Hospital, which is operated and controlled by the State of Michigan at the Charles E. Egeler Facility in Jackson, Michigan. At the hospital, LeMarbe was treated by a general surgeon named Dr. Wisneski, who discovered during the course of the appointment that LeMarbe suffered from chronic gallstone problems, specifically cholecystitis, and scheduled LeMarbe for surgery to remove his gallbladder.

On July 22, 1996, Dr. Wisneski performed a cholecystectomy or gallbladder removal surgery on LeMarbe at the Duane L. Waters Hospital. On July 24 and 25, 1996, Dr. Wisneski met with LeMarbe for follow-ups to his surgery and noted that LeMarbe was recovering well.

---

[1] On December 16, 1998, the district court, upon the agreement of the parties, dismissed with prejudice Defendants Cotton Correctional Facility and Duane L. Waters Hospital. Dr. Price and the John Doe defendants were voluntarily removed from this case when LeMarbe filed his amended complaint without any reference to these parties. On March 31, 2000, the district court accepted the magistrate judge's report and recommendation to grant Fairbanks's and Straub's motions for summary judgment based upon qualified immunity. LeMarbe is not appealing the district court's decision on Fairbanks's and Straub's motions for summary judgment.

On July 26, 1996, however, LeMarbe's recovery noticeably began to falter, and as a result, Dr. Edgar Eichum, another general surgeon at Duane L. Waters Hospital, ordered lab tests on LeMarbe. On July 29, 1996, Dr. Wisneski reviewed the results of LeMarbe's lab tests and met with LeMarbe. The results of these lab tests indicated that LeMarbe may have had "a bile leak somewhere, or a bile obstruction." Joint Appendix ("J.A.") at 34 (Wisneski Dep. at 16).

On July 30, 1996, Dr. Wisneski met with LeMarbe again and observed that LeMarbe "wasn't doing as well as [Dr. Wisneski] wanted [LeMarbe] to be doing." J.A. at 35 (Wisneski Dep. at 17). Later that day, Dr. Wisneski "put down a nastrogastric tube to empty [LeMarbe's] stomach," as LeMarbe was suffering from symptoms of nausea and abdominal distention. J.A. at 35 (Wisneski Dep. at 18). After unsuccessfully taking other steps to resolve LeMarbe's problems, Dr. Wisneski made a decision to perform exploratory surgery on LeMarbe.

On July 31, 1996, Dr. Wisneski began to conduct an exploratory laparotomy on LeMarbe. Upon entering LeMarbe's abdomen during the laparotomy, Dr. Wisneski encountered approximately five liters of a "muddy yellow-brown odorless fluid." J.A. at 36 (Wisneski Dep. at 21). According to Dr. Wisneski, the fluid "looked like ascitic fluid," but "from the color of it [he] thought it was [biliary fluid because] [i]t was lightly tinged yellow and there isn't anything in the abdomen that would give it that color other than bile." J.A. at 36 (Wisneski Dep. at 21-22). Dr. Wisneski then began to look for the source of the leak. Unable to discover the reasons for the fluid, Dr. Wisneski sought the assistance of Dr. Eichum. Dr. Eichum, however, was also unable to uncover the reason for the fluid. Thereafter, Dr. Wisneski drained the fluid from LeMarbe's abdomen and, although he was concerned about the fluid collecting again in

LeMarbe's abdomen, Dr. Wisneski closed LeMarbe's surgical incision and ended the exploratory surgery.

On August 1 and 2, 1996, Dr. Eichum saw LeMarbe again, and according to Dr. Wisneski, LeMarbe's abdomen was not distended at that time. A few days later, on August 5, 1996, Dr. Wisneski saw LeMarbe once more and discharged him the following day. On August 13, 1996, Dr. Wisneski saw LeMarbe again, as LeMarbe's abdomen had become quite distended for a second time. Dr. Wisneski finally referred LeMarbe to a gastroenterologist, Dr. Marlo Hurtado, who saw LeMarbe on August 14, 1996. Thereafter, Dr. Wisneski did not see LeMarbe again.

Dr. Hurtado sent LeMarbe to Foote Hospital on August 16, 1996. On August 20, 1996, Dr. Blaine Tacia performed another exploratory surgery with an intraoperative cholangiogram on LeMarbe. In so doing, Dr. Tacia discovered that LeMarbe's abdomen was distended due to fourteen liters (3 ½ gallons) of bile in the peritoneal cavity in his abdomen. Dr. Tacia commented that the adhesions inside LeMarbe's belly cavity were among the worst he had ever seen and that the accumulation of bile in LeMarbe's abdomen had caused serious damage to LeMarbe's biliary tract. Dr. Tacia discovered that the leak of fluid was due to a complete transection of LeMarbe's common bile duct[2] and found a clip

---

[2] Dr. Tacia later explained that he didn't "know whether it was a common bile duct or whether it was a common hepatic duct" because the adhesions in LeMarbe's abdomen were so terrible. J.A. at 142 (Tacia Dep. at 16). According to Dr. Tacia, "[t]he common hepatic duct is the bile duct that exists before the cystic duct enters; and the common bile duct is where the bile duct exists between after where the cystic duct has entered it and where it enters into the bowel, goes through the pancreatic substance and enters into the bowel." J.A. at 142 (Tacia Dep. at 15).

on that duct, which Dr. Tacia explained was unusual.[3] Dr. Tacia also stated that the transection occurred during one of Dr. Wisneski's surgeries. According to Dr. Tacia, the transection necessitated an immediate repair of the leak, as "there [was] no way for the bile to get down into the bowel." J.A. at 144 (Tacia Dep. at 24).

Because of the extensive damage in LeMarbe's abdomen, Dr. Tacia then performed a Roux-en-Y choledochojejunostomy on LeMarbe. Despite this surgery, however, LeMarbe still had to undergo several more surgeries at Foote Hospital and at the Detroit Receiving Hospital. In fact, LeMarbe was in and out of hospitals for the two years following his surgery with Dr. Tacia.

As a result of his medical treatment at Duane L. Waters Hospital, LeMarbe filed this lawsuit, alleging a violation of his constitutional right to have his serious medical needs attended to without deliberate indifference. On March 31, 2000, the district court issued an opinion and order accepting the report and recommendation of the magistrate judge to deny Dr. Wisneski's motion for summary judgment, holding that LeMarbe "ha[d] presented sufficient facts to rebut Defendant Wisneski's claim that he was not deliberately indifferent to [LeMarbe's] serious medical needs." J.A. at 183. In so doing, the district court relied heavily on the affidavit of Dr. James Sarnelle, a general surgeon who asserted that LeMarbe's bile leak had to be stopped immediately after its discovery. Dr. Sarnelle explained that any general surgeon would have known, upon discovering five liters of bile in

---

3 Dr. Tacia testified that he could think of no reason for a clip to be on the common bile or common hepatic duct. J.A. at 147 (Tacia Dep. at 35-36). According to Dr. Tacia, it would not have been unusual to find a clip on the cystic duct, which would have to be transected during a gallbladder removal surgery. J.A. at 147 (Tacia Dep. at 36-37). He further explained that the bile likely would have stopped leaking if the leak was from the cystic duct as cystic duct leaks would eventually seal off. J.A. at 148 (Tacia Dep. at 37).

LeMarbe's abdomen on July 31, 1996, that the bile in the abdomen came from a leak, that the bile leak would cause serious, permanent damage to LeMarbe if not stopped, that bile would continue to leak into LeMarbe's abdomen if the bile leak was not stopped, that the bile leak needed to be stopped before LeMarbe's exploratory surgery ended, and that LeMarbe had to be referred immediately to a specialist who could locate and stop the leak if the surgeon was unable to do so himself. J.A. at 104 (Sarnelle Aff.). Dr. Sarnelle also stated that "[t]he risk of harm to Richard LeMarbe on 7/31/96 was extreme and obvious to anyone with a medical education and to most lay people." J.A. at 104 (Sarnelle Aff.).

II. ANALYSIS

Dr. Wisneski argues that he is entitled to qualified immunity because he merely exercised his medical judgment in deciding how to treat LeMarbe, and a dispute over the specific method of treatment does not rise to the level of deliberate indifference. "Qualified immunity is 'an entitlement not to stand trial or face the other burdens of litigation.'" *Saucier v. Katz*, --- U.S. ---, 121 S. Ct. 2151, 2156 (2001) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). A government official performing a discretionary function is entitled to qualified immunity from a suit for civil damages unless his actions have violated a clearly established statutory or constitutional right. *Sanderfer v. Nichols*, 62 F.3d 151, 153 (6th Cir. 1995) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Thus, a plaintiff must prove two factors to show that a government official is not entitled to qualified immunity from his suit: (1) that the facts as alleged by him show a violation of a constitutional right; and (2) that such violated right was clearly established. *Saucier*, 121 S. Ct. at 2155.

A. Jurisdiction

Before we address the merits of Dr. Wisneski's arguments, however, we must first address the question whether we have jurisdiction over Dr. Wisneski's appeal. The Supreme Court has explained that a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable final decision within the meaning of 28 U.S.C. § 1291 under the collateral order doctrine. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). In *Johnson v. Jones*, 515 U.S. 304 (1995), the Supreme Court clarified that the *Mitchell* decision was explicitly limited to appeals challenging only the purely legal issues of whether the alleged facts amounted to a constitutional violation and what law was clearly established, and "not a district court's determination about what factual issues are 'genuine.'" *Id.* at 313 (quoting Fed. R. Civ. P. 56(c)). Therefore, "in order for an interlocutory appeal to be appropriate, a defendant seeking qualified immunity must be willing to concede to the facts as alleged by the plaintiff and discuss only the legal issues raised by the case." *Shehee v. Luttrell*, 199 F.3d 295, 299 (6th Cir. 1999), *cert. denied*, 530 U.S. 1264 (2000); *see also Booher v. Northern Ky. Univ. Bd. of Regents*, 163 F.3d 395, 396 (6th Cir. 1999).

In this case, because Dr. Wisneski has stipulated to LeMarbe's version of the facts for purposes of appeal, the issues in this case involve only the legal questions of (1) whether the facts as alleged by LeMarbe show a violation of a constitutional right; and (2) whether that right, when viewed in the specific context of this case, was clearly established. *See Saucier*, 121 S. Ct. at 2156; *Johnson*, 515 U.S. at 313. As a result, we hold that the district court's denial of qualified immunity is a "final decision" under § 1291 and that we have jurisdiction to decide this case on the merits of the qualified immunity issue. *See Williams v. Mehra*, 186 F.3d 685, 690 (6th Cir. 1999).

B. Qualified Immunity

Upon review of the merits of Dr. Wisneski's appeal, we conclude that the district court did not err in denying Dr. Wisneski's motion for summary judgment based upon qualified immunity. In this case, LeMarbe has not only alleged facts that would prove a violation of one of his constitutional rights; he has also successfully shown that such right was clearly established. We note that since Dr. Wisneski has stipulated to LeMarbe's version of the facts for purposes of this appeal, we must view "the evidence, all facts, and any inferences that may be drawn from the facts . . . in the light most favorable" to LeMarbe. *Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619, 622 (6th Cir. 2000); *see also Shehee*, 199 F.3d at 299.

1. Violation Of Constitutional Right

We first conclude that LeMarbe has alleged facts that, when viewed in his favor, would prove a violation of his constitutional right to have his serious medical needs treated without deliberate indifference. Under the Eighth Amendment, a prisoner has a right not to have prison officials act with deliberate indifference to his health and safety. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994); *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). The Supreme Court has explained that "deliberate indifference describes a state of mind more blameworthy than negligence" and that it entails "something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result." *Farmer*, 511 U.S. at 835; *Estelle*, 429 U.S. at 105 ("An accident, although it may produce added anguish, is not on that basis alone to be characterized as wanton infliction of unnecessary pain."). Consequently, a prison official is only

"found liable under the Eighth Amendment for denying an inmate humane conditions of confinement [if] the official knows of and disregards an excessive risk to inmate health or safety." *Farmer*, 511 U.S. at 837. As the Supreme Court explained, "*the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.*" *Id.* (emphasis added); *see also Westlake v. Lucas*, 537 F.2d 857, 860 (6th Cir. 1976) (noting that courts are not "to engage in the process of second-guessing in every case the adequacy of medical care that the state provides") (citation omitted). "*Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence* . . . and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Farmer*, 511 U.S. at 842 (emphasis added); *see also Brooks v. Celeste*, 39 F.3d 125, 128-29 (6th Cir. 1994).

In this case, LeMarbe has presented factual evidence, which when viewed in a light most favorable to him, would prove that Dr. Wisneski was aware of facts that supported an inference of a substantial risk of serious harm to LeMarbe and that Dr. Wisneski had both drawn and disregarded that inference when he closed LeMarbe's surgical incision on July 31, 1996, and then failed to take the action that his training indicated was necessary to stop the bile leak in a timely manner. As the Supreme Court explained in *Farmer*, a prisoner "need not show that [the] prison official acted or failed to act believing that harm actually would befall [the prisoner to prove a violation of his Eighth Amendment right]; it is enough [for the prisoner to show] that the official acted or failed to act despite his knowledge of a substantial risk of serious harm." *Farmer*, 511 U.S. at 842.

a. Facts From Which Inference Of Substantial Risk Of Serious Harm Could Be Drawn

First, we conclude that LeMarbe has alleged facts that, when viewed in a light most favorable to him, would show that Dr. Wisneski was aware of facts from which a substantial risk of serious harm could be inferred. These facts are: (1) that Dr. Wisneski encountered five liters of fluid in LeMarbe's stomach on July 31, 1996, and knew that the fluid was bile; (2) that Dr. Wisneski knew that the bile came from a leak;[4] (3)

---

[4] To support his factual allegations that Dr. Wisneski knew that the fluid in LeMarbe's abdomen was bile and that Dr. Wisneski knew that the bile came from a leak, LeMarbe provided the following evidence. LeMarbe presented deposition testimony from Dr. Tacia, in which Dr. Tacia asserted that the muddy yellowish-brown fluid he encountered in LeMarbe's abdomen was clearly bile. During his deposition, Dr. Tacia stated that he could tell the fluid in LeMarbe's abdomen was bile "[j]ust by looking at it. Biliary fluid has a yellowish color to it. It's slightly thick. And this looked exactly like biliary fluid." J.A. at 141 (Tacia Dep. at 12). Additionally, LeMarbe presented testimony from Dr. Wisneski himself, which suggested that Dr. Wisneski knew that the fluid in LeMarbe's abdomen was bile. J.A. at 34. For example, Dr. Wisneski asserted that the fluid "looked like ascitic fluid," but "from the color of it [he] thought it was [biliary fluid because] [i]t was lightly tinged yellow and there isn't anything in the abdomen that would give it that color other than bile." J.A. at 36 (Wisneski Dep. at 22). Finally, LeMarbe presented evidence to support his allegation that Dr. Wisneski knew that the bile came from a leak. Such evidence included an affidavit from Dr. Sarnelle, stating that any general surgeon who had encountered the five liters in LeMarbe's stomach would have known that the "[b]ile was leaking from some place." J.A. at 104 (Sarnelle Aff.). LeMarbe also provided deposition testimony from Dr. Wisneski, who testified to looking for the source of the leak during the July 31, 1996 exploratory surgery and to seeking help from Dr. Eichum to find the source of the leak. J.A. at 36 (Wisneski Dep. at 21). Dr. Wisneski also testified:

> *Q: You would think that he had a bile leak or a bile obstruction by looking at these lab results by looking at the elevated bilirubin on July 27th, 96?*

that Dr. Wisneski knew that he had not stopped the bile leak when he closed LeMarbe's surgical incision from the exploratory surgery on July 31, 1996; (4) that Dr. Wisneski made no immediate plans to seek help to stop the bile leak after he sewed LeMarbe back up;[5] and (5) that Dr. Wisneski knew that if the leak were not timely closed, the bile would continue to leak and would cause LeMarbe serious harm.[6]

A: I mean that's what I would interpret that as.
Q: And you next saw [LeMarbe] July 29th, 96?
A: Yes.
Q: And would you tell us what you charted on that day?
A: I wrote the patient is feeling much better than yesterday. His bowels are moving, he's eating, has less pain and my plan was to again put him on a regular diet and repeat his labs.
Q: Had you had the opportunity to see the July 27th, 96 labs at that point in time?
A: Yes.
Q: Did you suspect a bile leak at that point in time based upon the labs?
A: That was a concern, yeah.
J.A. at 34 (Wisneski Dep. at 16) (emphasis added).

[5] In support of this factual allegation, LeMarbe presented deposition testimony from Dr. Wisneski, in which the doctor explicitly conceded that after he "could find no cause for the fluid . . . [he] elected to close [LeMarbe] up." J.A. at 36 (Wisneski Dep. at 21). LeMarbe also provided evidence to show that Dr. Wisneski did not refer him to a specialist until nearly two weeks after his exploratory surgery on August 13, 1996. J.A. at 38 (Wisneski Dep. at 30).

[6] In support of this factual allegation, LeMarbe submitted an affidavit from Dr. Sarnelle, in which Dr. Sarnelle declared that any general surgeon who had encountered five liters of bile in LeMarbe's abdomen would have known that "[i]f surgery was terminated and the surgical incision was closed, the bile would continue to leak" and that "[b]ile leaking into the peritoneal cavity would certainly cause painful, severe and permanent internal injuries to the patient." J.A. at 104 (Sarnelle Aff.). LeMarbe also provided deposition testimony from Dr. Wisneski, in which Dr. Wisneski admitted to his concerns about the further collection of the potentially caustic bile fluid in LeMarbe's abdomen. When asked if Dr. Wisneski was

When viewed in a light most favorable to LeMarbe, all of the aforementioned facts (which must be conceded by Dr. Wisneski for the purposes of this qualified immunity review), would require the conclusion that Dr. Wisneski knew that a substantial risk of serious harm to LeMarbe existed. It is undisputed that the steady leak of large quantities of bile into LeMarbe's abdomen presented a substantial risk of serious harm to his health and that such a leak continued to present a substantial risk of serious harm to LeMarbe until it was stopped. Indeed, in his affidavit, Dr. Sarnelle unequivocally declared "[t]he risk of harm [from the bile leak] to Richard LeMarbe on 7/31/96 was extreme and *obvious to anyone with a medical education and to most lay people*." J.A. at 104 (Sarnelle Aff.) (emphasis added). *See Farmer*, 511 U.S. at 842 (holding that "a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious"). *Cf. Sherrod v. Lingle*, 223 F.3d 605, 611 (7th Cir. 2000) (noting in a case where the medical staff suspected appendictis but failed to treat it that "[a] jury could understand the notation 'rule out appendicitis' to mean that sufficient tests should be performed to eliminate that as a potential cause of [the prisoner's] pain"). In sum, we hold that LeMarbe has successfully alleged facts, which when accepted as true, would prove that Dr. Wisneski was aware of the facts from which a substantial risk of serious harm could be inferred.

b. Drawing The Inference Of Substantial Risk Of Serious Harm And Disregarding It

Second, we conclude that LeMarbe has alleged facts, which when viewed in a light most favorable to him, would show that Dr. Wisneski drew the inference that LeMarbe faced a substantial risk of serious harm from the bile leak in

---

"concerned that after [he] sewed [LeMarbe] back up that the fluid would collect again," he answered "Absolutely." J.A. at 36 (Wisneski Dep. at 24).

his abdomen and that Dr. Wisneski disregarded such risk when he closed LeMarbe's surgical incision on July 31, 1996, failed to refer LeMarbe *immediately* to a specialist who could stop the leak, and also failed to inform LeMarbe of the failure to stop the leak so that LeMarbe could take any additional measures necessary to stop the leak *in a timely manner, i.e.*, request medical treatment from a specialist who could stop the leak. Specifically, LeMarbe has provided an affidavit from Dr. Sarnelle, who swore that "*anyone with a medical education* and [] *most lay people*" who encountered five liters of bile in a patient's abdomen would have known that the bile in LeMarbe's abdomen was due to a leak and that such condition posed a substantial risk of serious harm to LeMarbe if the leak was not closed or stopped before permanent damage occurred. J.A. at 104 (Sarnelle Aff.) (emphasis added). In so doing, Dr. Sarnelle provided the following explanation:

> *Any general surgeon* opening Richard LeMarbe's peritoneal cavity on 7/31/96 and seeing 5 liters of bile which had accumulated since a cholecystectomy eight days earlier would know:
>
> 1. *Bile was leaking from some place.*
>
> 2. *The bile leak had to be located and stopped before the surgery was terminated* and the surgical incision was closed.
>
> 3. *If surgery was terminated and the surgical incision closed, the bile would continue to leak.*
>
> 4. *Bile leaking into the peritoneal cavity would certainly cause painful, severe and permanent internal injuries to the patient.*

> 5. That the bile leak could be located by a hida scan or pre or post op. Exposure of the common bile duct could be done during the procedure on 7/31/96.
>
> 6. *That if he could not locate the bile, then he had to refer the patient to someone with the training and experience to find and fix the bile leak.*

J.A. at 104 (Sarnelle Aff.) (emphasis added). We believe that this affidavit, if accepted as true, would prove that Dr. Wisneski's failure to seek help to stop LeMarbe's bile leak in a timely manner constituted a conscious disregard for LeMarbe's health. *See Farmer*, 511 U.S. at 837 (holding that a prison official may be liable under the Eighth Amendment for denying an inmate humane conditions if he knows of and disregards an excessive risk to the inmate's health); *see also Malley v. Briggs*, 475 U.S. 335, 341 (1986) (noting that qualified immunity "provides ample protection to all but the plainly incompetent").

The fact that LeMarbe was seen by Dr. Wisneski and other staff after his exploratory surgery on July 31, 1996 does not necessarily immunize Dr. Wisneski from liability for his actions. A government doctor has a duty to do more than simply provide some treatment to a prisoner who has serious medical needs; instead, the doctor must provide medical treatment to the patient without consciously exposing the patient to an excessive risk of serious harm. As the Seventh Circuit recently recognized in *Sherrod*, "a prisoner is not required to show that he was literally ignored by the staff" to prove an Eighth Amendment violation, only that his serious medical needs were consciously disregarded. *Sherrod*, 223 F.3d at 611-12 ("If knowing that a patient faces a serious risk of appendicitis, the prison official gives the patient an aspirin

and an enema and sends him back to his cell, a jury could find deliberate indifference although the prisoner was not 'simply ignored.'"). Similarly, the fact that Dr. Wisneski eventually referred LeMarbe to a specialist does not automatically immunize Dr. Wisneski from liability for LeMarbe's intervening injuries. For, as many federal courts have recognized, a deliberately indifferent delay in giving or obtaining treatment may also amount to a violation under the Eighth Amendment. *See, e.g., McElligott v. Foley*, 182 F.3d 1248, 1257 (11th Cir. 1999).

In sum, we conclude that, when viewed in a light most favorable to LeMarbe, the facts as alleged and supported by LeMarbe (that Dr. Wisneski knew that the fluid was bile, was aware of the substantial risk of serious harm as explained by Dr. Sarnelle, and failed to seek adequate help to stop the bile leak in a timely manner despite such knowledge) show that Dr. Wisneski clearly acted with a conscious disregard for LeMarbe's health and safety and violated LeMarbe's Eighth Amendment right to have his serious medical needs attended to without deliberate indifference. In other words, we believe that LeMarbe has raised more than just a simple question of whether Dr. Wisneski made the right medical judgment in treating him.

In that sense, we believe that LeMarbe's case is properly distinguishable from this court's recently decided en banc decision in *Williams v. Mehra*, 186 F.3d 685 (6th Cir. 1999) (en banc). In *Williams*, the deceased prisoner killed himself by overdosing on an antidepressant prescribed to him by prison doctors. The deceased prisoner had attempted to kill himself before in a county jail by hoarding pills and then overdosing. Thereafter, he was transferred to a new prison to begin serving his sentence. Despite his past attempt to commit suicide by hoarding pills, the deceased prisoner was prescribed antidepressant pills which were administered in a pill line in his new prison. Even with the precaution of the pill line, the

deceased prisoner managed to hoard pills and ultimately killed himself by overdosing.

In reviewing a claim that the various doctors who had cared for the prisoner were deliberately indifferent to his medical needs because they failed to give him his medication in liquid, as opposed to pill, form, we concluded that there were inadequate facts to support the claim of deliberate indifference. For, although we attributed to the doctors knowledge that the prisoner had previously attempted to kill himself by hoarding pills, as well as knowledge that liquid medications reduce the likelihood of hoarding medicine, we stated that there was no possible Eighth Amendment violation because there was no evidence "that pill lines are generally less effective at preventing hoarding, or that this [was] true at [the prison facility] in particular" and there was no "evidence that any of the [doctors] knew that the pill line was not effective at preventing hoarding of medication." *Id.* at 692. We also remarked that "[t]here is nothing to suggest that the doctors were failing to treat [the decedent] or doing less than their training indicated was necessary." *Id.* Finally, we held that there needed to be evidence "that the doctors actually knew that dispensing [the] tablets in a pill line constituted an excessive risk to [the decedent's] health or safety" to deny the doctors' motion for summary judgment based on qualified immunity. *Id.* In essence, in *Williams*, we held that the § 1983 claim must fail because there was no proof that the doctors were aware of the facts from which an inference of a substantial risk of serious harm could be drawn (in particular, that the use of pill lines is less effective at preventing hoarding than the use of liquid medication) and that the doctors drew that inference of a substantial risk (in particular, that the doctors knew that the pill line was not effective at preventing hoarding and that the doctors knew that dispensing tablets in a pill line constituted an excessive risk to the prisoner's health).

Unlike in *Williams*, LeMarbe has presented adequate factual evidence to support his claim that Dr. Wisneski drew the inference of a substantial risk of serious harm to LeMarbe and disregarded it. Specifically, LeMarbe has submitted proof that supports his contention that Dr. Wisneski knew that the fluid in LeMarbe's abdomen was bile and that the bile came from a leak; that Dr. Wisneski knew that the bile leak, if not stopped immediately, would expose LeMarbe to a substantial risk of serious harm; and that Dr. Wisneski disregarded such risk by failing to take the actions he knew were necessary to avoid the potentially serious harm to LeMarbe. Consequently, and consistent with *Williams*, we hold that LeMarbe has established that the facts as alleged by him show a constitutional violation.

2. Clearly Established Right

We also conclude that LeMarbe has successfully proven that the allegedly violated right was clearly established. Although a government doctor is entitled to qualified immunity if he has merely made a reasonable mistake in his medical judgment, he is not entitled to such immunity if he correctly perceived all the relevant facts, understood the consequences of such facts, and disregarded those consequences in his treatment of a patient. *Saucier*, 121 S. Ct. at 2158-59; *Farmer*, 511 U.S. at 842-43. As the Supreme Court has repeatedly recognized, a prisoner has a right not to have his serious medical needs disregarded by his doctors. *Estelle*, 429 U.S. at 104. Assuming that a jury accepts the facts as alleged by LeMarbe and believes the affidavit of Dr. Sarnelle, in which Dr. Sarnelle claimed that Dr. Wisneski, as a person with a medical education, must have been aware of the risk posed to LeMarbe, then Dr. Wisneski's actions cannot, under all relevant precedents, reasonably be considered to be the result of a mere reasonable mistake or negligence but only

the result of a conscious disregard for LeMarbe's health. It is clearly established that, if a doctor knows of a substantial risk of serious harm to a patient and is aware that he must either seek immediate assistance from another doctor to prevent further serious harm or must inform the patient to seek immediate assistance elsewhere, and then fails to do in a timely manner what his training indicates is necessary to prevent such harm, that doctor has treated the patient with deliberate indifference. *See Farmer*, 511 U.S. at 837 (stating that a prison doctor may exhibit deliberate indifference if he "knows and disregards an excessive risk to inmate health or safety"); *Estelle*, 429 U.S. at 104-05 (noting that a prison doctor may exhibit deliberate indifference by intentionally delaying access to medical care).

III. CONCLUSION

For the foregoing reasons, we **AFFIRM** the district court's decision to deny Dr. Wisneski's motion for summary judgment based upon qualified immunity and remand for further proceedings.

DISSENT

ALICE M. BATCHELDER, dissenting. Because the majority departs from our en banc opinion in *Williams v. Mehra*, 186 F.3d 685 (6th Cir. 1999) and Supreme Court precedent, I respectfully dissent. In *Williams*, we spoke definitively to the question of what kind of standard (subjective or objective) we must apply in § 1983 cases brought by a prisoner hoping to allege an Eighth Amendment violation because some prison official allegedly acted with deliberate indifference towards the prisoner's serious medical needs. That standard is unequivocally a subjective standard. *See Williams*, 186 F.3d at 692 ("To make this case, Plaintiff would need to show that the doctor[] actually knew" about an excessive risk and disregarded that risk.).

More importantly, *Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct. 1970 (1994), could not have been more clear that it is a subjective standard federal courts must apply in cases such as this. *See Farmer*, 511 U.S. at 829, 114 S. Ct. at 1974 ("This case requires us to define the term 'deliberate indifference,' as we do by requiring a showing that the official was *subjectively* aware of the risk.") (Emphasis added.).[1] But as is clear from the majority's opinion, the majority applies an objective

[1] On December 16, 1998, the district court, upon the agreement of the parties, dismissed with prejudice Defendants Cotton Correctional Facility and Duane L. Waters Hospital. Dr. Price and the John Doe defendants were voluntarily removed from this case when LeMarbe filed his amended complaint without any reference to these parties. On March 31, 2000, the district court accepted the magistrate judge's report and recommendation to grant Fairbanks's and Straub's motions for summary judgment based upon qualified immunity. LeMarbe is not appealing the district court's decision on Fairbanks's and Straub's motions for summary judgment.

standard to conclude that Dr. Wisneski may have acted with deliberate indifference towards LeMarbe's serious medical needs.

Nowhere is this more clear than in the majority's relying upon an affidavit from an expert witness, Dr. Sarnelle. To make out the subjective showing that *Farmer* requires, Sarnelle's affidavit would have to say that Sarnelle knows, first, that Dr. Wisneski actually knew facts from which an inference of excessive risk could be drawn, and second, that Dr. Wisneski actually drew that inference. But Sarnelle's affidavit simply provides Sarnelle's opinion of what Dr. Wisneski or anyone with a medical education should have known. Sarnelle's affidavit thus provides an objective standard, not a subjective one, and this is wholly insufficient to show an Eighth Amendment violation. *See Farmer*, 511 U.S. at 837-38, 114 S. Ct. at 1979 ("[T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference . . . [A]n official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment.").

To the extent that the majority points to evidence besides Dr. Sarnelle's affidavit to establish Dr. Wisneski's alleged deliberate indifference, I respectfully disagree. Again, *Williams* and *Farmer* demand that we apply a subjective standard. Here, applying that subjective standard requires LeMarbe to show that Dr. Wisneski actually identified a severed bile duct as the problem and then, despite having identified the problem, Dr. Wisneski sewed up LeMarbe, aware that substantial harm would likely result. But that is simply not what the record evidence shows in this case.

What the undisputed record evidence shows is that both Dr. Wisneski and Dr. Eichum looked for a leak in LeMarbe's bile duct, and when they found no leak, erroneously concluded that

there was none and closed LeMarbe's incision. While Drs. Wisneski and Eichum may have committed medical malpractice when they failed properly to diagnose LeMarbe's problem, they did not violate LeMarbe's Eighth Amendment rights. *See Estelle v. Gamble*, 429 U.S. 97, 105-06, 97 S. Ct. 285, 291-92 (1976).[2] (Deliberate indifference does not include negligence in diagnosing a medical condition.).

In departing from *Williams* and *Farmer*, the majority violates the venerable rule in this circuit that one panel may not overrule the published precedent of another panel, let alone the precedent established by the en banc court. *See Meeks v. Illinois Cent. Gulf R.R.*, 738 F.2d 748, 751 (6th Cir. 1984) ("[A] panel of this court may not overrule a previous panel's decision. Only an en banc court may overrule a circuit precedent, absent an intervening Supreme Court decision.") (citing *Timmreck v. United States*, 577 F.2d 372, 376 n. 15 (6th Cir.1978), *rev'd on other grounds*, 441 U.S. 780, 99 S. Ct. 2085 (1979)).[3] For all of these reasons, I dissent.

---

[2] Dr. Tacia later explained that he didn't "know whether it was a common bile duct or whether it was a common hepatic duct" because the adhesions in LeMarbe's abdomen were so terrible. J.A. at 142 (Tacia Dep. at 16). According to Dr. Tacia, "[t]he common hepatic duct is the bile duct that exists before the cystic duct enters; and the common bile duct is where the bile duct exists between after where the cystic duct has entered it and where it enters into the bowel, goes through the pancreatic substance and enters into the bowel." J.A. at 142 (Tacia Dep. at 15).

[3] *See also Chrisner v. Complete Auto Transit, Inc.*, 645 F.2d 1251, 1267 n.6 (6th Cir. 1981) ("It has been the policy of this circuit that one panel cannot overrule the decision of another panel absent either intervening Supreme Court authority to the contrary or other circumstances which render the precedent clearly wrong. [citation omitted] . . . It is my hope that both the majority's disregard for circuit precedent and its misanalysis of the business necessity issue will be regarded as aberrational.") (Keith, J., dissenting).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RICHARD LeMARBE,

Plaintiff,

v. Case No. 98 CV 74028 DT
HON. DENISE PAGE HOOD

SHARON FAIRBANKS, JEROME WISNESKI, and DENNIS STRAUB,

Defendants.[4]
_____/

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

This matter is before the Court on two Report and Recommendation by Magistrate Judge Virginia Morgan dated June 18, 1999 and September 22, 1999. Only Defendant Wisneski timely filed Objections to both Report and Recommendation.

---

[4] The remaining Defendants pursuant to Plaintiff's First Amended Complaint are: Sharon Fairbanks, Dennis Straub, and Dr. Jerome Wisneski. Defendants Cotton Correctional Facility and Duane L. Waters Hospital, named Defendants in the original Complaint, were dismissed by stipulation in an Order dated December 16, 1998. The other Defendants in the original Complaint, John Doe and Doctor Price, are DISMISSED because they are not named in Plaintiff's First Amended Complaint.

II. ANALYSIS

A. Defendants Straub and Fairbanks

The Court agrees with the Magistrate Judge that Defendant Dennis Straub, the Warden of the Cotton Correctional Facility, is entitled to summary judgment. Plaintiff has failed to plead, and failed to present sufficient evidence to create an issue of fact, that Defendant Straub possessed the personal knowledge of Plaintiff's dietary needs or played any role in determining the content of Plaintiff's diet. Liability in a 42 U.S.C. § 1983 action cannot be based on a theory of *respondeat superior*. *Monell v. New York City*, 436 U.S. 658, 691 (1978); *Bellamy v. Bradley*, 729 F.2d 416, 421 (6th Cir. 1984). To hold a supervisor liable, a § 1983 plaintiff must show that a supervisory official at least implicitly authorized, approved or knowingly acquiesced in an unconstitutional conduct of an offending subordinate. *Bellamy*, 729 F.2d at 421; *Taylor v. Michigan Dep't of Corrections*, 69 F.3d 76 (6th Cir. 1995). Plaintiff has failed to show that Defendant Straub had personal knowledge of Plaintiff's dietary needs or played a role in determining the content of Plaintiff's diet. The Court notes that Plaintiff did not object to the Magistrate Judge's recommendation on this issue. Defendant Straub is dismissed from this action.

Defendant Sharon Fairbanks is a registered dietician who reviewed Plaintiff's file and recommended Plaintiff maintain a low fat diet. The Court agrees with the Magistrate Judge that Plaintiff has not shown that Defendant Fairbanks was deliberately indifferent to Plaintiff's dietary needs. As noted by the Magistrate Judge, Plaintiff's claim is not that Defendant Fairbanks refused to recommend a certain diet but rather the low fat diet he received was unsatisfactory because the food was greasy and it upset his stomach. Defendant Fairbanks was not responsible for the preparation of the food. Plaintiff did

not object to this portion of the Magistrate Judge's Recommendation. Defendant Fairbanks is entitled to summary judgment.

B. Defendant Wisneski

Dr. Jerome Wisneski performed surgery on Plaintiff on July 22, 1996 and an exploratory surgery on July 31, 1996. The Court agrees with the Magistrate Judge in both her Reports and Recommendation that Plaintiff has presented sufficient issues of fact as to whether Defendant Wisneski was responsible for the complications which have forced Plaintiff to endure numerous surgical procedures as well as a great deal of pain and discomfort. Dr. James Sarnelle, a board certified surgeon, stated in his affidavit that in his opinion, Defendant Wisneski's conduct between July 22, 1996 and August 13, 1996 was so reckless as to demonstrate a substantial lack of concern for Plaintiff's health. Dr. Sarnelle's opinion, along with other evidence presented by Plaintiff, creates a genuine issue of material fact as to whether Defendant Wisneski was deliberately indifference to Plaintiff's serious medical needs.

Defendant argues that he is entitled to qualified immunity in light of the Sixth Circuit case, *Williams v. Mehra*, 186 F.3d 685 (1999).[5] The United States Supreme Court has held that "deliberate indifference" to a prisoner's "serious medical needs" by a prison doctor or a prison guard is prohibited by the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97, 104-105 (1976); *Leach v. Shelby County Sheriff*, 891 F.2d 1241, 1244

[5] In his Objections, Defendant Wisneski notes that the Magistrate Judge's June 18, 1999 Report and Recommendation relied on the case, *Williams v. Mehra*, 135 F.3d 1105 (6th Cir. 1998), which was vacated pending a rehearing en banc, *Williams v. Mehra*, 144 F.3d 428, 429 (6th Cir. 1998). Even though the case cited by the Magistrate Judge had been vacated at the time of her Report and Recommendation, the citation of the case does not render her Report and Recommendation void, especially the findings of facts.

(6th Cir. 1998). In order to sustain and Eighth Amendment claim based on inadequate medical care, a prisoner must satisfy a two-prong test. First, he must establish that his medical needs were serious. *Estelle*, 429 U.S. at 104. Second, he must demonstrate that defendant prison official acted with deliberate indifference to those serious medical needs. *West v. Keve*, 571 F.2d 158, 161 (3rd Cir. 1978). The Supreme Court in *Farmer v. Brennan*, 114 S.Ct. 1970 (1994) held that deliberate indifference under the Eighth Amendment requires a showing that the official had actual knowledge of the risk of harm. The official must: 1) be actually aware of facts from which an inference could be drawn that a substantial risk of harm exits; 2) actually draw the inference; but 3) nevertheless disregard the risk to the inmate's health or safety. *Id.*, at 1978-1979.

"Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The Sixth Circuit has established a three part test to evaluate claims of qualified immunity: 1) whether a constitutional violation has occurred; 2) whether the right that was violated was clearly established right of which a reasonable person would have known; and 3) whether the plaintiff has alleged sufficient facts, and supported the allegations by sufficient evidence, to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights. *Dickerson v. McClellan*, 101 F.3d 1151, 1157-1158 (6th Cir. 1996).

In *Williams*, the Sixth Circuit, on rehearing *en banc*, applied the test in *Dickerson* and found that plaintiff had presented no evidence show that the doctors were deliberately indifferent in treating the plaintiff's serious medical needs. The prisoner in *Williams* had committed suicide with an overdose of Sinequan tablets which he had hoarded. Plaintiff's

representative claims that the doctors who treated the decedent failed to change his medication from the tablets to liquid. The liquid medication may have reduced the hoarding of medicine, and thus the risk of suicide. The Sixth Circuit found that Plaintiff presented no evidence to evaluate the comparative risks of the pill line distribution, which Plaintiff participated in at various times in his imprisonment, and liquid distribution. The Sixth Circuit further found that Plaintiff did not present evidence to show that the pill lines are generally less effective at preventing hoarding of pills nor did she present evidence that any of the psychiatrists know that the pill line was not effective at preventing hoarding of medication. The Sixth Circuit did not hold, as Defendant Wisneski suggests, that "once medical treatment has been rendered this Court cannot second guess that treatment." (Defendant Wisneski's August 9, 1999 Rule 56(b) Motion for Summary Judgment Brief, p.2.) The Sixth Circuit applied the three-part analysis set forth in *Dickerson* and found that in that case Plaintiff had shown no evidence that the psychiatrists know the pill line was not effective in preventing hoarding of medication. The Sixth Circuit did not make a blanket statement that once medical treatment has been rendered to a prisoner, court should not second-guess the judgment of medical professionals. The Court notes that the two dissents (a total of seven Circuit Judges dissenting and concurring in part) in the *Williams* case indicate that, depending on the evidence presented, a district court is able to find genuine issues of material fact in a case involving medical treatment claims. *Williams*, 186 F.3d at 694-696.

In this case, Plaintiff has shown he suffers from a serious medical need—Plaintiff's bile duct problems, including leakage. The Court agrees with the Magistrate Judge's findings that there are genuine issues of material fact that Defendant Wisneski was deliberately indifferent to Plaintiff's serious medical needs. As noted above and in the Magistrate

Judge's Report and Recommendation, that there are testimonies by other doctors that may show that, if proven at trial, Defendant Wisneski was the one responsible for the bile leaking in Plaintiff's bile duct area after the July 22, 1996 gallbladder removal surgery. When Dr. Wisneski performed an exploratory surgery on July 31, 1996, Plaintiff claims that Dr. Wisneski failed to find the leak and closed the abdomen without repairing the leak. Doctors, including Dr. Wisneski, have testified that bile can be very caustic and cause severe infection and ultimately death. Dr. Sarnelle's opined that Dr. Wisneski's conduct between July 22, 1996, after the gallbladder surgery was performed, until August 13, 1996, when Plaintiff received further surgery form another doctor, was so reckless as to demonstrate a substantial lack of concern for Plaintiff's health. Plaintiff was presented sufficient facts to rebut Defendant Wisneski's claim that he was not deliberately indifferent to Plaintiff's serious medical needs. Defendant Wisneski is not entitled to qualified immunity.

III. CONCLUSION

For the reasons set forth above, Defendants Straub and Fairbanks are dismissed. Defendant Wisneski's Motion for Summary Judgment is denied.

Accordingly,

IT IS ORDERED that the June 18,1999 and the September 22, 1999 Reports and Recommendation of Magistrate Judge Morgan (other than the reference to the vacated *Williams* opinion) are ACCEPTED and ADOPTED as this Court's findings of facts and conclusions of law.

IT IS FURTHER ORDERED that Defendant Straub's rule 56(b) Motion for Summary Judgment **(Docket No. 22, filed**

February 1, 1999) is GRANTED. Defendant Straub is DISMISSED form this action with prejudice.

IT IS FURTHER ORDERED that Defendant Fairbanks' Motion for Summary Judgment and Motion to Dismiss **(Docket No. 19, filed January 29, 1999 and No. 33, filed March 9, 1999)** are GRANTED. Defendant Fairbanks is DISMISSED from this action with prejudice.

IT IS FURTHER ORDERED that Defendant Wisneski's Motions for Summary Judgment **(Docket No. 37, filed April 12, 1999 and No. 50, filed August 9, 1999)** are DENIED.

IT IS FURTHER ORDERED that a Status Conference be held on **Monday, April 24, 2000, 2:30 p.m.** before the undersigned to address any outstanding discovery issues and setting final pretrial conference and trial dates in this matter.

IT IS FURTHER ORDERED that other than Defendant Wisneski, all other Defendants are dismissed in this case.

_____

DENISE PAGE HOOD
United States District Judge

DATED: _____

00-1383
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RICHARD LEMARBE,	)	
	)	
Plaintiff-Appellee,	)	
v.	)	ORDER
JEROME J. WISNESKI, DOCTOR,	)	
	)	
Defendant-Appellant,	)	

BEFORE: KEITH, BATCHELDER, and MOORE, Circuit Judges.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been transferred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Batchelder would grant rehearing for the reasons stated in her dissent.

ENTERED BY THE ORDER OF THE COURT

Leonard Green, Clerk